

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
PETITION FOR  
REHEARING  
EN BANC**





# No. 77-1131

## United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,  
APPELLEE,

v.

ROBERT P. MARCHAND, JR.,  
APPELLANT.

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Pg 5

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF VERMONT.

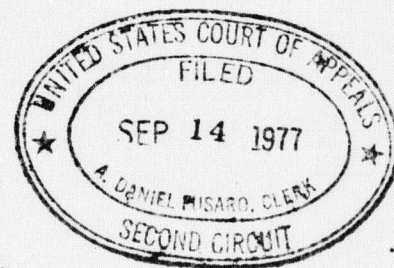
### Petition for Rehearing and Suggestion for Rehearing En Banc.

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BOSTON, MASSACHUSETTS.

## TABLE OF CONTENTS

|      |                                                                                                                                               |    |
|------|-----------------------------------------------------------------------------------------------------------------------------------------------|----|
| I.   | Introduction                                                                                                                                  | 2  |
| II.  | Reason for granting rehearing or rehearing en banc                                                                                            | 3  |
|      | A. The burden of proof standard applied by the panel is in error                                                                              | 3  |
|      | B. The standard applied by the panel is legally incorrect                                                                                     | 5  |
|      | C. The standard applied by the panel is inconsistent with that applied in <u>Ceccolini</u>                                                    | 8  |
|      | D. Applying the correct burden of proof, the record of this case cannot sustain the panel's ultimate conclusion on the Fourth Amendment issue | 10 |
| III. | Conclusion                                                                                                                                    | 17 |



# TABLE OF AUTHORITIES

## Cases

|                                                                                                      |                |
|------------------------------------------------------------------------------------------------------|----------------|
| Fitzgerald v. United States Lines Co., 306 F. 2d 461<br>(2nd Cir. 1962)                              | 3              |
| Moody v. Albermarle Paper Co., 417 U.S. 633 (1974)                                                   | 3              |
| National Labor Relations Board v. Brown & Roots, Inc.,<br>206 F. 2d 73 (8th Cir. 1953)               | 3              |
| United States v. Ceccolini, 542 F. 2d 136 (2nd Cir.<br>1976), cert. granted, 45 U.S.L.W. 3715 (1977) | 4,5,8,<br>9-10 |
| United States v. Capra, 510 F. 2d 267 (2nd Cir.<br>1974), cert. denied, 420 U.S. 990 (1975)          | 4a,9           |
| United States v. Cole, 463 F. 2d 163 (2nd Cir. 1972),<br>cert. denied, 409 U.S. 942                  | 4a,8           |
| United States v. Falley, 489 F. 2d 33 (2nd Cir. 1973)                                                | 4a, 5,9        |
| United States v. Friedland, 441 F. 2d 855 (2nd Cir.<br>1971), cert. denied, 404 U.S. 867             | 8              |
| United States v. Mahone, 537 F. 2d 922 (7th Cir. 1976),<br>cert. denied                              | 15             |
| United States v. Schipani, 414 F. 2d 1262 (2nd Cir. 1969)                                            | 5              |
| Walters v. Moore McCormack Lines, Inc., 312 F. 2d 893<br>(2nd Cir. 1963)                             | 3              |
| Wisniewski v. United States, 353 U.S. 901 (1957)                                                     | 3              |
| Wong Sun v. United States, 371 U.S. 471 (1963)                                                       | 5              |

## Constitutional Provisions

United States Constitution

Fourth Amendment

2,10,17

## Rules

Federal Rules of Appellate Procedure

Rule 35 (b)

1

Rule 40 (a)

1



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
No. 77-1131

UNITED STATES OF AMERICA,  
Appellee,

v.

ROBERT P. MARCHAND, JR.,  
Appellant.

ON APPEAL FROM A JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

Petition For Rehearing And Suggestion For  
Rehearing En Banc

To: The Honorable Henry J. Friendly, William H Timbers,  
and Thomas J. Meskill, Circuit Judges

or

The Honorable Chief Judge Irving R. Kaufman and the  
Circuit Judges of the United States Court of Appeals  
for the Second Circuit, En Banc

Pursuant to Rule 40 (a) of the Federal Rules of  
Appellate Procedure and the rules of this Court, Robert P.  
Marchand, Jr., appellant in the above-captioned matter, re-  
spectfully petitions for rehearing of the decision rendered  
in this case on August 22, 1977. Should the panel deny re-  
hearing, appellant respectfully suggests, pursuant to Rule  
35 (b) of the Federal Rules of Appellate Procedure and the  
rules of this Court, that rehearing en banc would be approp-  
riate and requests that such a rehearing be granted.



## I. INTRODUCTION

In affirming his conviction on one count of possession and distribution of marijuana, the panel rejected appellant's claim that seizure of a particular note, whose contents were used against appellant at trial, violated appellant's rights under the Fourth Amendment (Op. 5405-5412). The note had been seized from appellant's person at the time of his arrest. The essence of the rejected Fourth Amendment claim is that the arrest had been based on information derived from appellant's driver's license - and that driver's license had been illegally seized from appellant's wallet, found lying on a table, prior to the arrest; accordingly, the arrest, a derivative of the illegal seizure of the license, was itself illegal, and in turn, the note, a direct product of the arrest, was constitutionally tainted.

In rejecting this claim, the panel agreed with appellant's initial premise, that the arresting officer improperly extracted Marchand's driver's license from the wallet lying on the dining room table, thereby learning certain information pertinent to appellant's identity (Op. at 5407); it also agreed with appellant's concluding premise, stating "if defendant were right [that the ensuing arrest was not legal] a new trial would be required" because of the incriminating nature and impact of the contents of the note (Op. at 5405, text and n. 16, emphasis added); it held, however, that a new trial was not required because other information, available to the arresting officer, and not derived from the driver's license, could have



provided probable cause for the decision to arrest (see, Op. 5407-5411). In so holding, the panel applied a standard of burden-of-proof which, by the panel's own acknowledgement, was guided by "no federal authority squarely on this point" (Op. at 5407-5408) - a standard which appellant submits is incorrect as a matter of law, and as will be demonstrated below, is inconsistent with prior panel decisions in this Circuit. It is to review the application of this standard that rehearing and rehearing en banc are sought.

Because of the novelty of this question and the likelihood that the panel's decision will "affect many other cases" (see, Walters v. Moore McCormack Lines, Inc., 312 F. 2d 893, 894 (1963)); because of the need to secure "consistency ...in the more or less contemporaneous decisions of different panels of a Court of Appeals" (see, Wisniewski v. United States, 353 U.S. 901, 902 (1957); Moody v. Albermarle Paper Co., 417 U.S. 622, 626 (1974); Fitzgerald v. United States Lines Co., 306 F. 2d 461, 463 (1962)); and because "a new trial would be required" if appellant is "right" (Op. at 5405); (see, National Labor Relations Board v. Brown & Root, Inc., 206 F. 2d 73, 74 (8th Cir. 1953) this case is a paradigmatic one for rehearing and rehearing en banc.

## II. REASON FOR GRANTING REHEARING OR REHEARING EN BANC

### A. THE BURDEN OF PROOF STANDARD APPLIED BY THE PANEL IS IN ERROR

The issue presented on this petition is whether the panel applied the correct standard in testing the legality of



a warrantless arrest which was admittedly based at least in part on information which was the direct result of an illegal search and seizure. The standard applied by the panel was whether or not the legally obtained information could have supported probable cause to arrest - without regard for the actual effect of the illegally obtained information upon the arresting officer's decision to arrest. The panel, acknowledging that there is "no federal authority squarely on this" (Op. 5407-5408) - i.e. on what standard is to be applied in evaluating the situation in which an officer making a field arrest without a warrant acts upon both legally and illegally obtained information in deciding to arrest - finds authority for its view in an analogy with search warrant cases, stating "we see no significant distinction between the question here presented and that arising where both legally and illegally obtained evidence have been offered to obtain a search warrant" (Op. 5408) (emphasis added). Petitioner submits that the analogy applied by the panel is flawed both logically and legally and, moreover, conflicts with the burden of proof analysis applied by other panels of this Court, including most recently the decision in United States v. Ceccolini, 542 F. 2d 136, 140-141 (2nd Cir. 1976), cert. granted, 45 U.S.L.W. 3715 (1977).<sup>1</sup>

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1. That the panel's decision in this case is inconsistent with that of Ceccolini is implicitly acknowledged by the panel's "But see" reference to Ceccolini in footnote 19 of the opinion in this case. Op. at 5408. What is particularly confusing, however, is that both the panel decision here and Ceccolini cite the same (footnote continued on page 4a.)

precedents; United States v. Capra, 510 F. 2d 267 (2nd Cir. 1974), cert. denied, 420 U.S. 990 (1975); United States v. Falley, 489 F. 2d 33 (2nd Cir. 1973); United States v. Cole, 463 F. 2d 163 (2nd Cir.), cert. denied, 409 U.S. 942 (1972).



B. THE STANDARD APPLIED BY THE PANEL  
IS LEGALLY INCORRECT

The logical and legal flaw emerges from a review of the basic principles governing taint cases. In determining whether evidence is so tainted by a prior illegality that its exclusion is judicially mandated the basis test to be applied focuses on what information the officer actually relied upon in his decision making process. As set forth by the Supreme Court in Wong Sun v. United States, 371 U.S. 471, 488 (1963), the question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality [i.e., by reliance or derivative reliance on that illegality] or instead by means sufficiently distinguishable to be purged of the primary taint [i.e., by reliance on an independent source]". Under well established standards of this Circuit the government bears the burden of affirmatively proving reliance on an independent source by a preponderance of the evidence. See, e.g., United States v. Schipani, 414 F. 2d 1262 (2nd Cir. 1969); United States v. Falley, 489 F. 2d 33 (2nd Cir. 1973); United States v. Ceccolini, 542 F. 2d 136 (2nd Cir. 1972), cert. granted, 45 U.S.L.W. 3715 (1977).

When evidence has been seized or an arrest has been made pursuant to a warrant issued on the basis of a prior judicial determination that the supporting affidavit demonstrates probable cause, and it is later claimed that the evidence must be suppressed because the affidavit contained illegally obtained



information factors inherent in the warrant process enable the government to meet its burden of proof without the presentation of additional evidence as to the thought processes of the officer who obtained the warrant. In submitting an affidavit prior to the issuance of the warrant the officer sets down on paper precisely those bases upon which he is, in fact, relying. If one of these bases is later found to be illegal, the court can determine the validity of the officer's actions simply by excising the illegally obtained information from the warrant and making a new judicial determination as to the existence of probable cause on the basis of the remaining facts alone. If those remaining, legal, facts are sufficient to constitute probable cause then they meet the government's burden of proof as to an independent source. There is no need for further testimony from the officer as to whether or not he actually relied on those remaining, legal, facts because the inclusion of those facts in the initial application for a warrant, without more, demonstrates his reliance.

For example, assume that an officer obtains a warrant on the basis of a three paragraph affidavit; paragraph 3 contains illegally obtained information but paragraphs 1 and 2, in and of themselves, establish probable cause; and evidence seized during the execution of that warrant is later challenged as tainted. The court could justifiably find that the government had not met its burden of proving reliance on an independent source by a preponderance of the evidence simply by excising



paragraph 3. No additional testimony would be necessary, for by the fact of submitting paragraphs 1 and 2 to the court, the officer previously demonstrated his reliance on the information contained within them.

However, where, as here, an officer initiates an arrest or a search without the submission of an affidavit for a prior judicial determination of probable cause and a claim that the action is tainted by illegally obtained information is later raised, the court cannot, as it can in the case of an affidavit-search warrant case - and as it improperly did here (Op. 5407-5408) - simply disregard that illegally obtained information and conclude that since the legally obtained information "would have been" sufficient to establish probable cause the government has met its burden of proving reliance on an independent source by a preponderance of the evidence. The fatal flaw in so doing lies in the absence of any prior documentation of reliance on the legally obtained information by the officer operating in the field. Without an affidavit setting forth such reliance the government must present sufficient evidence at the suppression hearing to enable the court to make a finding that the government has, by a preponderance of the evidence, demonstrated that the officer did, in fact, rely upon the independent source and not upon the illegally obtained information.

This case is a paradigmatic example of the second situation. There was no judicial determination of the bases of Adcock's identification of the appellant prior to his arrest.



Nevertheless, in evaluating the validity of that arrest, this panel did not require the government to make an affirmative showing that it relied in fact on an independent source; rather it looked solely to whether or not an independent untainted source - the photograph of Marchand viewed earlier by Adcock - "would have" been sufficient if in fact relied upon (Op. 5407). It did not, as proper application of the appropriate standard mandated, require the government to affirmatively prove by a preponderance of the evidence that Adcock in fact relied on her memory of the prior photograph to identify the appellant.

C. THE STANDARD APPLIED BY THE PANEL IS  
INCONSISTENT WITH THAT APPLIED IN  
CECCOLINI

The warrantless taint cases previously decided by this Circuit and cited by the panel in the course of its opinion in this case (including its "But see" reference to United States v. Ceccolini, at 5408, footnote 16) illustrate the flaw in its analysis and application of the burden of proof to the facts of this case. In United States v. Cole, 463 F.2d 163 (2nd Cir. 1972), cert. denied, 409 U.S. 942, the government overcame a claim of taint from illegal electronic eavesdropping by producing clear affirmative evidence of its reliance on evidence obtained from a completely independent source as the major basis for seeking and, in fact, the sole basis for obtaining, a saturation investigation by the Internal Revenue Service. 462 F. 2d at 173. Similarly, in United States v. Friedland, 441 F. 2d 855 (2nd. Cir. 1971), cert. denied, 404 U.S. 867, again faced



with a claim of taint from illegal wiretaps, the government produced affirmative evidence that its totally independent evidence obtained during the course of other investigations supported the initiation of the investigation leading to defendant's indictment. In United States v. Falley, 489 F. 2d 33 (2nd Cir. 1973), the government specifically eschewed any reliance on an address book seized during the course of an illegal search as the basis for obtaining documents introduced against the defendant from a third individual and introduced evidence that it had begun the investigation resulting in the discovery of the documents prior to the illegal search and seizure. Again, in United States v. Capra, 501 F. 2d 267 (2nd Cir. 1974), cert. denied, 420 U.S. 990 (1975), the government introduced evidence that an agent who had no knowledge of the illegal wiretaps possessed independent probable cause to justify a warrantless seizure of the defendant's automobile. Thus in these four cases the court declined to suppress precisely because the government had made an affirmative showing of reliance in fact on an independent source; it did not, as here, simply rest its decision on a mere showing of an untainted "possibility."

Finally, in United States v. Ceccolini, 542 F. 2d 136 (2nd Cir. 1976), cert. granted, 45 U.S.L.W. 3715 (1977) where all that the government offered to satisfy its burden of proof was precisely a possibility that an independent source "would have" led to the discovery of the evidence at issue, the panel upheld the suppression of the evidence, quoting the district court's reasoning approvingly:



While certainly it is possible, perhaps even probable, that the FBI would have interviewed Miss Hennessy later in the course of the gambling investigation, I do not believe that the government has sustained its burden of proving by a fair preponderance of the credible evidence that it would have inevitably come across her in the course of its investigation.

At the time she was interviewed no other employee of Ceccolini's flower shop had been interviewed by the FBI. While it is true that other employees were subsequently interviewed and called before the grand jury, it is not entirely clear that the investigation would have focused on the employees of the flower shop at all were it not for the illegal search and the favorable response of Lois Hennessy to the FBI interview.

Under these circumstances the government's assertion that any taint resulting from the illegal search is purged by the fact that the Hennessy testimony would have been inevitably discovered by the FBI must fail.

Under the standard approved in Ceccolini, a reversal in this case would be mandated since the record here, just as in Ceccolini, discloses no more than a mere possibility of independence.

D. APPLYING THE CORRECT BURDEN OF PROOF, THE  
RECORD OF THIS CASE CANNOT SUSTAIN THE  
PANEL'S ULTIMATE CONCLUSION ON THE FOURTH  
AMENDMENT ISSUE

To understand the error in this panel's analysis and its failure to properly apply the requisite burden of proof, it is necessary to once more review the facts and circumstances surrounding Marchand's arrest. Even adopting this panel's conclusion that "the picture" from which Detective Adcock recognized Marchand was not the picture on his license



(see Op. at 5406-5407<sup>2</sup>), neither the findings of the District Court nor the testimony of Agent Harris - the only witness called by the government to testify as to the facts of the arrest - permits this panel to find that the government met its burden of proving by a preponderance of the evidence that the arrest in fact stemmed independently from Adcock's recognition of Marchand on the basis of this photograph.

While the District Court did state that "Detective Adcock recognized the defendant from having seen his photograph. She also recognized the defendant's name" (A. 151) (see Op. at 5406) the import of these statements is far from clear; the source of "his photograph" is not stated and both the "name" and the "photograph" are stated as joint bases of recognition. This statement, moreover, must be read in the context of the District Court's further statement, somewhat later in its decision, that, "the court has found that Detective Adcock, or one of the other officers, initially identified the defendant by removing his driver's license from his wallet," (A. 160) (emphasis added). Thus, the District Court's decision read as a whole lends equal support to a conclusion that the arrest was dependent upon and thereby tainted by the seizure of the license, as to a conclusion that the arrest was effected on the basis of the "photograph." Accordingly, it cannot be relied upon to establish even by a preponderance of the evidence that the identification was independent of the illegal seizure.

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2. Marchand's license did, in fact, contain his picture. See Exhibit "A".



Nor does careful review of Harris' testimony assist the government in negating the inference of taint and affirmatively proving reliance on an independent source by a preponderance of the evidence. According to Harris, Adcock came to him, license in hand, and "stated that she knew Robert Marchand... that Mr. Marchand was known to her and that [from conversation with Agent Handoga in Vermont] she had reason to believe he was a fugitive from the District Court of Vermont on a marijuana conspiracy indictment" (A. 110-111). The events following this revelation, rather than demonstrating the irrelevance of the license, indicate that, contrary to this panel's conclusion, the information on the license (still assuming, contrary to fact, that the license did not contain a photograph), including Marchand's name, was an integral component in the decision to arrest and not merely "reinforcement" or "added assurance" for an independently based prior determination of probable cause (see Op. at 5407).

Timing is a key factor here - and a factor entirely ignored by the panel in its decision. Marchand was not arrested when Adcock informed Harris of her beliefs; instead Harris placed a phone call to Agent Handoga in Vermont and "advised him that we had personally identified Robert Marchand from the date of birth and other identifying information." (A.111) (emphasis added). It was only after Harris had spoken to Agent Handoga that Harris made his decision to arrest the defendant. (A.116, 118). This sequence of events further indicates the centrality of the illegally seized license to the identification process.



There is absolutely no evidence that the date of birth - the first piece of identifying information relied on by Agent Harris - was obtained from a source other than Marchand's license, and without the defendant's name, also obtained from the license, the phone call would have been worthless. Thus, the license provided information that Harris, the arresting officer, deemed essential to his decision to arrest the defendant, and on the basis of Harris' actions, the government must be deemed to have failed to meet its burden of proving probable cause based on an independent source by a preponderance of the evidence.

Additionally, Harris' assessment of the basis for Adcock's recognition of the defendant is, as the panel noted, "garbled" (Op. at 5406 n. 17). Analyzed logically it, like the remainder of the evidence, fails to establish an independent source. Harris does not state, as the panel apparently would like to believe, that Adcock informed him that she, Adcock, recognized Marchand solely on the basis of the photograph she had seen earlier. Indeed, the photograph (again assuming Adcock was referring to the earlier photograph and not the photograph on the license) is always mentioned in conjunction with the license. Asked how Adcock identified Marchand, Harris answered:

"I don't know if she did it completely on the on the driver's license or, well she stated she had seen a picture of the person before and she recognized the name and the picture and whatever and she knew it was Robert Marchand, the one that Agent Handoga had referred to earlier."

.....

I would assume from the driver's license... that's the normal procedure to identify the persons any how." (A. 117) (emphasis added).



The logical inferences to be drawn from this testimony are either that it required a conjunction of the name and the earlier photograph, or that seeing the name on the license jogged Adcock's memory and she then recollected seeing the photograph earlier and discussing the matter with Agent Handoga. Again the sequence of events supports a finding of dependence on the license. Adcock did not walk in the door, recognize Marchand from her memory of the photograph, announce her belief to Harris and then seek confirmation from the license. It was only after the seizure of the license that any recognition was announced.

Moreover, the photograph that Detective Adcock had seen earlier was the small photograph marked as trial exhibit "C" (A. 141). As the panel itself noted, Exhibit "C" was somewhat marred by glare and depicted Marchand at an earlier age (Op. 5396 at footnote 6). Indeed, it was this photograph of Marchand, Exhibit "C", that Perkins failed to select from the photographic display (A. 85, 148-149). This too strongly supports the conclusion that the identification was at least in critical part dependent upon the license and does not assist the government in establishing the requisite independent source.

A final factor militating against a finding that the government has met its burden of proving an independent source by a preponderance of the evidence is the government's failure to call Detective Adcock as a witness. Adcock was the only one who could testify directly as to the basis for her identification and enable the government to squarely confront the issue of whether her identification stemmed either in whole or in critical part from the illegally seized license. The government's



failure to call Adcock can only give rise to an inference that her testimony would have been adverse to the government. As stated by the court in United States v. Mahone, 537 F.2d 922 (7th Cir. 1976), cert. denied, an adverse inference may be drawn from the absence of a witness "peculiarly within the other party's power to produce" whose "testimony...would elucidate issues in the case." Id., at 926, 927. Both prerequisites to the drawing of an adverse inference - unavailability of the witness to the party seeking to draw the inference and the nature of the testimony - have been met in this case. "When the witness has a relationship with the [government] that would in a pragmatic sense make his testimony unavailable to the [defendant] regardless of physical unavailability" the witness is unavailable to the defendant. United States v. Mahone, 537 F.2d at 926. Such a relationship was found by the Mahone court where, as here, a state police officer involved in the arrest process was not called as a witness by the government in a federal prosecution. Moreover, in that case the officer was physically present outside the courtroom. Nevertheless, since he "had an interest in seeing his police work vindicated by a conviction of the defendant" (Id., at 927), the likelihood of bias rendered him not equally available. Similarly, in this case, it would be unrealistic to find that Detective Adcock - who was not even present outside the courtroom - was equally available to the defendant and the prosecution.<sup>3</sup>

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3. Nor can the government claim distance from the site of prosecution as an excuse as Agent Harris was also located in Florida.



The central nature of Adcock's<sup>c</sup> testimony cannot be doubted. She was the only witness who could resolve the ambiguities as to the basis for her identification and enable the government to definitively meet its burden of proof. Thus her unexplained absence can only give rise to an inference that her testimony would have been unfavorable to the government.<sup>4</sup>

Taking all of these factors together--the proper standard and allocation of the burden of proof, the ambiguity of the District Court's findings, the total absence of positive evidence that recognition was not based, at least in critical part, on the non-pictorial information obtained from the license, and the inferences to be most logically drawn from the sequence of events, Harris' testimony, the quality of the photograph and Adcock's unexplained absence as a government witness--Marchand submits that the government cannot possibly be found to have met its burden of proving by a preponderance of the evidence that his

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4. Although hearsay is, as this panel stated, admissible in a suppression hearing, to allow its use to sustain the government's burden of proof, particularly in a case such as this where the result actually hinges on the allocation of the burden of proof, can only encourage the government to avoid the dangers of rigorous cross-examination and prevent the court from making its determination on the best available evidence.



arrest was predicated on information obtained independently from the illegally seized license.

Furthermore, when the fact that Marchand's license did bear his photograph (see Exhibit "A" attached hereto) is added to the factors set forth above, it becomes even more apparent that the government has failed to meet its burden of proof in this case; both Harris' reference to recognition of "the name and the picture" and the District Court's findings of fact, can be read as logically to refer to the photograph on the license in front of Adcock as they would to the absent photograph which Adcock had previously seen. Since these were the only two bases for the panel's conclusion that the government's burden of proof had been met (see Op. at 5406), the additional evidence that the license also contains a photograph clearly undermines that conclusion.

#### CONCLUSION

The proper allocation of the burden of proof of taint in cases involving Fourth Amendment violations is an important and frequently recurring problem in the administration of criminal justice in this Circuit. In light of that importance, and for all the foregoing reasons, appellant respectfully requests that this Court grant his petition for rehearing en banc.

Alternatively appellant submits that because careful analysis of the trial record discloses that the government cannot be deemed to have met its burden of proving to a preponderance of the evidence that the note was discovered through an untainted independent source, and because the District Court, finding no illegal seizure of the license (A. 163), never reached the issue of taint, this Court should remand the case to the District Court for a new hearing on the appellant's motion to suppress.

Respectfully submitted,

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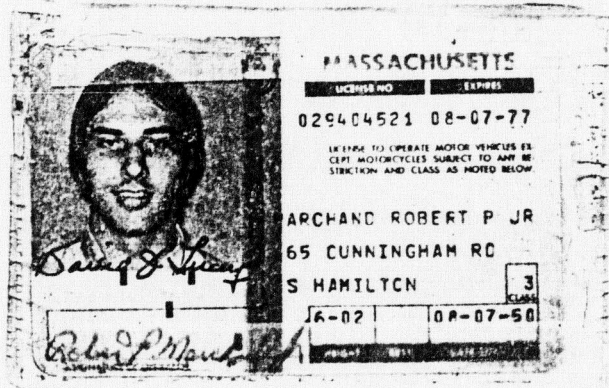
EXHIBIT "A"

RESTRICTION CODES: 1. CORRECTIVE LENSES 2. AUTOMATIC TRANSMISSION ONLY 3. RESTRICTION CARD MUST BE CARRIED 4. DAYLIGHT OPERATION ONLY 7. MOTORCYCLES ONLY 8. CORRECTIVE LENSES AND AUTOMATIC TRANSMISSION ONLY.

CLASS OF LICENSE CODES: 1. ANY MOTOR VEHICLE OR COMBINATION EXCEPT A SCHOOL BUS. 2. ANY MOTOR VEHICLE OR COMBINATION EXCEPT A SEMI-TRAILER UNIT, TRUCK-TRAILER COMBINATION, TRACTOR, SCHOOL BUS. 3. ANY MOTOR VEHICLE OR COMBINATION EXCEPT A SEMI-TRAILER UNIT, TRUCK-TRAILER COMBINATION, TRACTOR, TRUCK HAVING A REGISTERED GROSS WEIGHT IN EXCESS OF EIGHTEEN THOUSAND POUNDS, BUS OR SCHOOL BUS.

WRITE CHANGE OF ADDRESS OR RESIDENTIAL ADDRESS IF DIFFERENT FROM MAIL ADDRESS, ON LABEL OBTAINED AT REGISTRY AND ATTACH WITHIN LINES. NOTIFY REGISTRY IN WRITING.

IF SEPARATED, MUTILATED OR ALTERED A NEW LICENSE MUST BE OBTAINED.



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
No. 77-1131

UNITED STATES OF AMERICA,  
Appellee,

V.

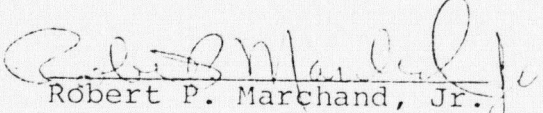
ROBERT P. MARCHAND, JR.,  
Appellant.

AFFIDAVIT

I, Robert P. Marchand, Jr., being sworn do depose  
and state the following:

1. That I am the appellant in the above-captioned matter;
2. That the driver's license annexed to this petition for rehearing and suggestion for rehearing en banc is my driver's license and was in my wallet on August 24, 1976;
3. That on August 24, 1976 I also possessed a valid driver's license issued by the State of New Hampshire, which also bore my photograph. However, that license has expired and I no longer have it in my possession.

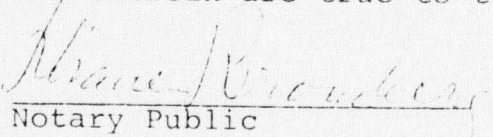
Sworn to under the pains and penalties of perjury.

  
Robert P. Marchand, Jr.

COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, SS:

September 6, 1977

Then personally appeared Robert P. Marchand, Jr., and made oath that he had read the contents of an affidavit which he had previously signed and that the contents therein are true to the best of his knowledge and belief.

  
Notary Public  
My commission expires:

1/5/79



CERTIFICATE OF SERVICE

I, Martin G. Weinberg hereby certify that I have this day served two copies of Petition for Rehearing and Suggestion for Rehearing En Banc upon the United States by delivering by mail, first class, postage pre-paid a copy thereof to Jill Jacobson, Assistant United States Attorney, United States Attorney's Office, Rutland, Vermont 05701

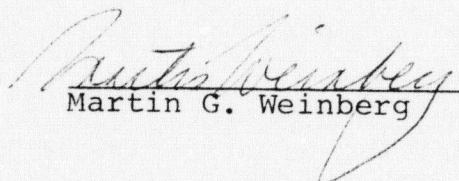
Dated at Boston, Massachusetts this 6th day of September, 1977.

\_\_\_\_\_  
Martin G. Weinberg

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